

**United States Department of Labor
Employees' Compensation Appeals Board**

S.K., Appellant

and

**DEPARTMENT OF VETERANS AFFAIRS,
VETERANS CANTEEN SERVICE, Dublin, GA,
Employer**

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**Docket No. 15-0221
Issued: July 22, 2015**

Appearances:

*Paul H. Felser, Esq., for the appellant
Office of Solicitor, for the Director*

Case Submitted on the Record

DECISION AND ORDER

Before:

PATRICIA H. FITZGERALD, Deputy Chief Judge
ALEC J. KOROMILAS, Alternate Judge
JAMES A. HAYNES, Alternate Judge

JURISDICTION

On November 7, 2014 appellant, through counsel, filed a timely application for review from an August 4, 2014 nonmerit decision of the Office of Workers' Compensation Programs (OWCP). Because more than 180 days elapsed from June 5, 2013, the date of the most recent merit decision of OWCP, to the filing of this appeal, pursuant to the Federal Employees' Compensation Act¹ (FECA) and 20 C.F.R. §§ 501.2(c) and 501.3, the Board lacks jurisdiction to review the merits of appellant's claim.

ISSUE

The issue is whether OWCP properly denied appellant's request for further merit review of her claim pursuant to 5 U.S.C. § 8128(a).

¹ 5 U.S.C. § 8101 *et seq.*

FACTUAL HISTORY

On August 20, 2012 appellant, then a 58-year-old food service worker, filed an occupational disease claim (Form CA-2) alleging that she developed swelling and pain in her neck and shoulder as a result of working in “main plate.” She first became aware of her condition and of its relationship to her employment on August 4, 2012.

By letter dated September 6, 2012, OWCP advised appellant of the evidence needed to establish her claim. It afforded her 30 days to submit additional evidence. OWCP also inquired about appellant’s duties to the employing establishment.

In a report dated March 6, 2012, Dr. Habigaile Crie, a Board-certified internist, diagnosed appellant with sprain and strain of the shoulder and upper arm. Appellant also submitted reports from Dr. Crie dated July 31, August 9, and 23, 2012, as well as the results of a magnetic resonance imaging (MRI) scan of the spine dated October 8, 2012.

By decision dated November 1, 2012, OWCP denied appellant’s claim, finding that she had not established that her medical condition was caused by a traumatic event on August 4, 2012.

On November 7, 2012 appellant requested an oral hearing before an OWCP hearing representative.

A hearing was held on March 19, 2013. Counsel noted that appellant had filed an occupational disease claim and contended that appellant had submitted sufficient evidence to establish a causal relationship between duties of her federal employment and an aggravation of her condition. The hearing representative stated that Dr. Crie’s reports did not contain an explanation of causal relationship and that appellant had not provided a sufficient statement of the duties alleged to cause her conditions. He notified counsel that he would keep the record open for 30 days of the submission of additional evidence.

The employing establishment submitted a report of the ergonomics of appellant’s work environment dated November 13, 2012, which included pushing a tray down an assembly line. In an attached statement, it noted that it had no evidence that she worked in “main plate,” but instead worked at a beverage station and a vegetable/soup station.

By letter dated April 16, 2013, the employing establishment stated that it concurred with the denial of appellant’s claim because the medical evidence did not demonstrate that her condition was related to an injury on August 4, 2012.

Appellant submitted admission notes dated February 7 and 18, 2013, which were not signed by a physician.

In an operative report dated March 4, 2013, Dr. Peter Holliday, a Board-certified neurosurgeon, described performing the following procedures on appellant on that date: an application of Gardner-Wells tongs to the skull; an anterior cervical discectomy; a left-sided foraminotomy at C4-5 and C5-6; an anterior cervical interbody fusion; demineralization of the bone matrix at C4-5 and C5-6; and application of a titanium plate and screws. He stated a

postoperative diagnosis of cervical spondylosis and neural foraminal stenosis producing left cervical radiculopathy at C4-5 and C5-6.

On March 4, 2013 Dr. Larry Schwartz, a Board-certified radiologist, examined the results of an x-ray of appellant's cervical spine. He stated an impression of status post fusion at C4-5 and C5-6 levels with interior plates and screws.

In a diagnostic report dated March 5, 2013, Dr. Arthur E. McCain, a Board-certified diagnostic radiologist, examined the results of an x-ray of appellant's cervical spine. He stated a stable appearance to enter a cervical fusion at C4-5 and C5-6.

In a note dated April 2, 2013, Dr. Holliday noted that appellant was four weeks postsurgery and that her x-rays looked good.

By decision dated June 5, 2013, the hearing representative affirmed OWCP's decision of November 1, 2012. He noted that appellant had still not submitted a medical report containing a clear and reasoned opinion on the causal relationship between duties of her federal employment and her diagnosed conditions.

In a note dated April 30, 2013, Dr. Holliday stated that he would release appellant to work on May 6, 2013 with permanent restrictions of no extension of the neck, no lifting above the shoulder, and no lifting more than 20 to 25 pounds.

Appellant submitted a description of her tour of duty and a statement dated May 18, 2013. She noted that the employing establishment had told her that there was no work available within her restrictions and that she should apply for Social Security. Appellant also submitted several documents related to her use of leave.

On June 4, 2014 appellant, through counsel, requested reconsideration. Counsel noted that additional evidence had been submitted, namely her statement, the report of Dr. Holliday dated April 30, 2013, and a description of her job duties. He argued that appellant had offered credible medical documentation confirming the presence of an injury resulting from her work duties and that the injuries had caused periods of disability. Counsel stated that at the very least, she had submitted enough information to require further development of the medical evidence.

By decision dated August 4, 2014, OWCP declined appellant's request for reconsideration without conducting a merit review. It noted that she had not submitted any new and relevant evidence to support reconsideration. OWCP also noted that counsel's arguments would depend on some degree of medical evidence of a causal relationship between her conditions and duties of her federal employment.

LEGAL PRECEDENT

To require OWCP to reopen a case for merit review under section 8128(a), OWCP's regulations provide that the evidence or argument submitted by a claimant must: (1) show that OWCP erroneously applied or interpreted a specific point of law; (2) advance a relevant legal argument not previously considered by OWCP; or (3) constitute relevant and pertinent new

evidence not previously considered by OWCP.² Section 10.608(b) of OWCP's regulations provide that when an application for reconsideration does not meet at least one of the three requirements enumerated under section 10.606(b)(2), OWCP will deny the application for reconsideration without reopening the case for a review on the merits.³

The Board has found that evidence that repeats or duplicates evidence already in the case record has no evidentiary value.⁴ The Board also has held that the submission of evidence which does not address the particular issue involved does not constitute a basis for reopening a case.⁵ While the reopening of a case may be predicated solely on a legal premise not previously considered, such reopening is not required where the legal contention does not have a reasonable color of validity.⁶

ANALYSIS

OWCP issued a June 5, 2013 decision finding that appellant had not established an occupational disease related to factors of her federal employment. On June 4, 2014 appellant requested reconsideration of this decision.

As noted above, the Board does not have jurisdiction over the merits of the June 5, 2013 decision. The issue presented on appeal is whether appellant met any of the requirements of 20 C.F.R. § 10.606(b)(3), requiring OWCP to reopen the case for review of the merits of her claim. In her June 4, 2014 request for reconsideration, appellant did not show that OWCP erroneously applied or interpreted a specific point of law, or advance a new and relevant legal argument not previously considered. Counsel's argument contained in her reconsideration request merely stated that she had submitted sufficient evidence to establish a causal relationship between duties of her federal employment and her diagnosed condition. This argument had already been considered in the hearing representative's decision of June 5, 2013. Thus, appellant is not entitled to a review of the merits of her claim based on the first and second above-noted requirements under section 10.606(b)(2).

The underlying issue is whether appellant met her burden of proof to establish an occupational disease, and specifically whether she had submitted sufficient evidence to establish a causal relationship between duties of her federal employment and the conditions of her neck and shoulders. A claimant may be entitled to a merit review by submitting new and relevant evidence, however, appellant did not submit any new and relevant evidence in this case. With her reconsideration request, she submitted a note from Dr. Holliday dated April 30, 2013, a description of her duties, and a statement. These documents, while not previously in the record and considered by OWCP, are irrelevant to the underlying issue of appellant's burden of proof to

² 20 C.F.R. § 10.606(b)(2); *D.K.*, 59 ECAB 141, 146 (2007).

³ *Id.* at § 10.608(b); *see K.H.*, 59 ECAB 495, 499 (2008).

⁴ *See Daniel Deparini*, 44 ECAB 657, 659 (1993).

⁵ *P.C.*, 58 ECAB 405, 412 (2007); *Ronald A. Eldridge*, 53 ECAB 218, 222 (2001); *Alan G. Williams*, 52 ECAB 180, 187 (2000).

⁶ *Vincent Holmes*, 53 ECAB 468, 472 (2002); *Robert P. Mitchell*, 52 ECAB 116, 119 (2000).

establish an occupational disease in the performance of duty. The note from Dr. Holliday dated April 30, 2013, while not previously considered by OWCP, is irrelevant to the underlying issue of causal relationship because it does not contain a rationalized opinion on the causal relationship between appellant's condition and duties of her federal employment. It merely stated that Dr. Holliday would release appellant to work on May 6, 2013 with permanent restrictions of no extension of the neck, no lifting above the shoulder, and no lifting more than 20 to 25 pounds. Likewise, the description of appellant's duties and her statement do not address the issue of causal relationship.

The Board accordingly finds that appellant did not meet any of the requirements of 20 C.F.R. § 10.606(b)(2). Appellant did not show that OWCP erroneously applied or interpreted a specific point of law, advance a relevant legal argument not previously considered by OWCP, or submit relevant and pertinent evidence not previously considered. Pursuant to 20 C.F.R. § 10.608, OWCP properly denied merit review.

CONCLUSION

The Board finds that OWCP properly denied appellant's request for review of the merits of her claim pursuant to 5 U.S.C. § 8128(a).

ORDER

IT IS HEREBY ORDERED THAT the decision of the Office of Workers' Compensation Programs dated August 4, 2014 is affirmed.

Issued: July 22, 2015
Washington, DC

Patricia H. Fitzgerald, Deputy Chief Judge
Employees' Compensation Appeals Board

Alec J. Koromilas, Alternate Judge
Employees' Compensation Appeals Board

James A. Haynes, Alternate Judge
Employees' Compensation Appeals Board